STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE RE: "0.08" TESTIMONY

The defendant took an Intoxilyzer test; the State can introduce the results of that test by showing that the test was administered properly by a qualified operator, using an approved machine, in compliance with DHS regulations. *Fuenning* does not prohibit the officer from testifying that the defendant appeared to be affected by alcohol, nor does it prohibit testimony that everyone is impaired at .08 BAC.

The State of Arizona, by and through undersigned counsel, respectfully requests this Court to deny the Defendant's Motion in Limine re: "0.08" Testimony for the reasons set forth in the following Memorandum of Points and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

On February 27, 1998 at approximately 1:10 a.m., Officer Watson of the Phoenix Police Department observed the defendant's vehicle stopped on the north side of the street at 21st Place and Taylor. The officer observed a black male walk up to the driver's side window, then around to the passenger's side and get in the defendant's vehicle. Officer Watson then made a U-turn and followed the defendant. The defendant did not stop at the stop sign on 21st Place and turned Eastbound on Fillmore. The officer activated his lights and pulled the defendant over.

Officer Watson contacted the driver and asked for his driver's license, registration and insurance. The defendant said, "I do not have a license or insurance. I should not be driving -- take me to jail." The officer immediately noticed the defendant had bloodshot, watery eyes and a moderate odor of alcohol. The defendant then performed two field sobriety tests; the officer found one cue on the Walk and Turn test, and no cues on the One Leg Stand. Officer Petrey responded to the scene as a back-up officer.

Officer Petrey conducted the Horizontal Gaze Nystagmus test and found all 6 cues present.

The defendant was arrested and the police searched his vehicle incident to arrest. The officers found an open bottle of Bud Ice beer underneath the seat and a 6-pack carton of beer between the bucket seats. There were only 4 beers in the pack and they were cold to the touch. At the police station the defendant blew a .137% at 1:42 a.m. and a .136% at 1:49 a.m. on the Intoxilyzer machine. The defendant has two misdemeanor DUI convictions from August 19, 1996 and January 21, 1997.

The defendant is now charged with four counts of Aggravated DUI, all Class 4 Felonies.

LAW AND ARGUMENT:

In the current case the Defendant's argument is irrelevant. The defendant complied with the Intoxilyzer test. Therefore, an expert can testify as to the results of the defendant's breath tests, as well as testify as to the effects of alcohol at the time of driving. The State can bring in the evidence of the breath test through an expert. Admission of testimony regarding the Intoxilyzer test and its results would primarily be governed by Arizona Rules of Evidence 702, which reads as follows:

> Testimony by Experts:
>
> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Cases construing Rule 702 have held that the proponent of evidence based on scientific, technical or specialized knowledge must make a showing of general

acceptance. *State ex rel. McDougall v. Johnson [Foster, Real Party in Interest]*, 181 Ariz. 404, 891 P.2d 871 (App. 1994) and *State ex rel. Collins v. Seidel [Deason, Real Party in Interest]*, 142 Ariz. 587, 691 P.2d 678 (1984). Also required is a foundational showing by a qualified expert that the accepted technique was properly used and the results accurately measured and recorded.

A.R.S. § 28-692.03(A) provides a statutory method for admission of what is essentially scientific or technical opinion evidence without the necessity of presenting testimony from "a witness qualified as an expert" as required by Rule 702 and cases construing that Rule. The statute does away with the necessity of expert testimony and permits the court to admit evidence of breath test analysis simply by showing that the test was administered using an approved device, by an operator holding a permit, who followed methods approved by DHS, and who complied with procedures adopted by DHS. This permits evidentiary admission of the test and its results with no expert testimony at all. The reliability and accuracy of the results is vouched for by demonstrating compliance with the statute and the procedures adopted by DHS. In Arizona, "the requirements of the statute must be scrupulously met so that there will be a uniform, statewide basis of testing to vouch for accuracy and reliability." *State ex rel. Collins v. Seidel [Deason, Real Party in Interest]*, 142 Ariz. 587, 591, 691 P.2d 678, 682 (1984).

The defendant here claims that the court should limit the testimony of the "0.08" effect and level of intoxication. As the Arizona Court of Appeals stated in *State v. Bojorquez*, 145 Ariz. 501, 702 P.2d 1346 (App. 1985), *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P.2d 121 (1983) did not set forth a *per se* rule that an officer's opinion

whether the defendant was intoxicated is inadmissible. Under *Fuenning*, the trial court is required to consider whether the probative value of the officer's opinion concerning the defendant's intoxication outweighs that testimony's prejudicial impact. *State v. Carreon*, 151 Ariz. 615, 729 P.2d 969 (1986), involved an officer who testified that in his opinion, based on his experience, certain drugs were possessed for sale. The defendant argued that admission of the officer's opinion was reversible error. The *Carreon* Court disagreed, stating, "the statement in *Fuenning* was *dicta* and did not expressly overrule existing case law allowing such testimony." *State v. Carreon*, 151 Ariz. at 617, 729 P.2d at 971.

In addition, the facts in *Fuenning* are distinguishable from the facts in this case. In *Fuenning*, the defendant was only charged with driving with an alcohol concentration of .10% or greater. *Fuenning* did not include a charge that the defendant was impaired to the slightest degree by alcohol. In the instant case, the defendant is charged with driving while being impaired to the slightest degree by alcohol as well as driving with a blood alcohol concentration above .10%. The officer's training, experience, and judgment of the defendant's condition are evidence that will be introduced at trial. For the officer or an expert to be precluded from testifying that the defendant was impaired is to send a message to the jury that the witnesses must *not* believe the defendant to be under the influence of alcohol, because otherwise the witnesses would just say that the defendant was drunk.

Rule 704, Arizona Rules of Evidence, provides that opinion testimony is not excludable merely because it embraces an ultimate issue of fact. Rule 704 and the comment thereto state as follows:

> Opinion on Ultimate Issue: Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.
>
> Comment
>
> Some opinions on ultimate issues will be rejected as failing to meet the requirement that they assist the trier of fact to understand the evidence or to determine a fact in issue. Witnesses are not permitted as experts on how juries should decide cases.

A police officer can also testify to the fact that the defendant appeared intoxicated, that he displayed signs and symptoms of alcohol intoxication, and that his conduct appeared influenced by alcohol. *State v. White*, 155 Ariz. 452, 457, 747 P.2d 613, 618 (App. 1987).

CONCLUSION:

For the foregoing reasons, the State requests the Court to deny the Defendant's Motion in Limine Re: "0.08" testimony.